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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-38

UNITED STATES OF AMERICA, APPELLANT

v.

MARINE BANCORPORATION, INC., NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK, AND JAMES E. SMITH, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINION BELOW

Neither the oral opinion of the district court (Tr. 1195-1210, App. 1138-1147), nor its findings of fact and conclusions of law (App. 1932-1952) are reported.

JURISDICTION

The judgment of the district court (J.S. App. B, pp. 48a-49a) was entered on January 31, 1973. The United States filed a notice of appeal to this Court

on March 30, 1973 (App. 1970–1971). Probable jurisdiction was noted on October 15, 1973 (App. 1973). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Phillipsburg National Bank,* 399 U.S. 350; *United States* v. *Third National Bank in Nashville,* 390 U.S. 171.

QUESTION PRESENTED

Whether the effect of the acquisition of a leading bank in the concentrated Spokane, Washington, banking market by one of the largest banks in the state may be substantially to lessen competition, in violation of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The [Comptroller of the Currency] shall not approve—
>
> * * * * *
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

STATEMENT

The United States instituted this civil antitrust action under Section 7 of the Clayton Act (15 U.S.C. 18). The complaint challenges the acquisition of the third largest bank in Spokane, Washington, the Washington Trust Bank ("Washington Trust"), by the second largest bank in the State of Washington, the National Bank of Commerce of Seattle ("NBC"), a subsidiary of the Marine Bancorporation, a bank holding company. The complaint (App. 9–16) alleged that the effect of the proposed acquisition may be substantially to lessen competition because the entry of NBC into the Spokane commercial banking

market through the acquisition of Washington Trust rather than by *de novo* entry or by a so-called foothold acquisition of a smaller bank would eliminate NBC as (a) a potential competitor whose future entry into Spokane other than by acquisition of a large market share could effect substantial deconcentration of that market; and (b) a perceived potential entrant exerting a procompetitive influence on banks in the Spokane market from its position on the fringe of the market.

The complaint also alleged that the acquisition of Washington Trust, the largest middle-sized bank with headquarters in Eastern Washington and one of the twelve remaining middle-sized banks in the state, would eliminate that institution as a potential competitor in other local markets in the state, would remove one of the few middle-sized banks capable of merging with other middle-sized and smaller banks and becoming a significant statewide or regional competitor, and would adversely affect banking competition by strengthening the dominance of the state's few large banking institutions.

After a trial the district court dismissed the complaint holding that the merger did not violate Section 7 and that if the merger would have some or all of the alleged anticompetitive effects, they are clearly outweighed by the effects of the merger in meeting the convenience and the needs of the community.[1]

[1] Prior to trial, all allegations in the complaint relating to actual competition in commercial banking and correspondent banking were abandoned. The case went to trial only on the potential competition issues detailed above.

A. THE STRUCTURE OF BANKING IN WASHINGTON

It is undisputed that the relevant product market in this case is, as the district court found (F. 11, App. 1934), "commercial banking."

Commercial banking is highly concentrated in the State of Washington, in Eastern Washington (a geographically distinct region comprised of 19 counties and separated from the Western part of the state by the Cascade Mountains), and in the Spokane metropolitan area, which the district court found to be the relevant geographic market (F.13, App. 1934).

There are 90 national and state banking organizations in Washington. The five largest banking organizations[2] hold 74.3 percent of total commercial bank deposits in Washington; they operate 421, or 61.3 percent, of the state's 687 commercial banking offices (GX A–17, App. 1165).[3] The two largest banking organizations (Seattle-First National Bank and NBC) hold 51.3 percent of total deposits, and operate 251 offices, or more than one-third, of the total number of banking offices operated in the state (*ibid.*). One or the other operates in 34 of the state's 39 counties, they

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[2] These organizations and their shares of total deposits held by all Washington banks are: Seattle-First National Bank (31.7 percent), NBC (19.6 percent), Pacific National Bank of Washington (10.0 percent), Peoples National Bank of Washington (7.2 percent), and Washington Bancshares, Inc. (5.8 percent) (GX A–17, App. 1165).

[3] Unless otherwise indicated, all figures are as of June 30, 1972. "GX" refers to government exhibits; "P.T.O." refers to the pre-trial order (App. 364–445); "Tr." refers to transcript; "Interr." refers to defendants' answers to plaintiff's interrogatories.

both operate in 25 counties, and in 22 of these 25 counties each has 10 percent or more of the total county bank deposits (GX A–23, App. 1173–1176, GX A–25, App. 1181–1184).

In most areas in Washington commercial bank deposits are, in various combinations, concentrated in the state's five largest banking organizations. Thus the state's five largest banking organizations, in various combinations, hold more than 75 percent of the bank deposits in 21 of the 39 counties (*ibid.*); in 30 counties one or two of the state's five largest banking organizations hold more than one-half of the deposits (*ibid.*).[4]

In Eastern Washington, the five banking organizations with the largest shares of bank deposits in that region[5] hold 84 percent of the area's total bank deposits and operate 69 percent of its offices (GX A–19, App. 1167). The large bulk of those deposits are in Spokane County (GX A–27, App. 1186), the most populous county in Eastern Washington, whose total deposits ranked third among all counties in the state (*ibid*).[6] In Spokane County, nine banking organiza-

[4] We do not contend that all counties are relevant local banking markets; however, county market share figures do reflect the pattern of statewide concentration at the local level.

[5] These organizations and their shares of Eastern Washington bank deposits are: Seattle-First National Bank (31.2 percent), Washington Bancshares, Inc. (22.8 percent), NBC (19.4 percent), Washington Trust (6.2 percent), and Pacific National Bank of Washington (4.4 percent) (GX A–19, App. 1167).

[6] Spokane County banking offices hold 8.4 percent of the total deposits in the state and 34.7 percent of Eastern Washington's bank deposits (GX A–27, App. 1186).

tions operate 52 banking offices (GX A–52, App. 1217), The three leading banking organizations in Spokane County [7] hold 89.6 percent of all commercial bank deposits and operate 75 percent of the offices in the county (*ibid.*).

The City of Spokane and the populated areas immediately adjacent to it (the Spokane metropolitan area), which comprise a part of Spokane County and which the district court found to be the relevant geographic market, is the third most populous area in the state (P.T.O., Admitted Facts IV, App. 366) and is the growing economic and financial center of the "Inland Empire," a rich geographic area in the Northwest (GX L–2, p. 5, App. 1751). The Spokane metropolitan area is served by only six of the nine banking institutions operating in Spokane County (*compare* GX A–52, App. 1217, *with* GX A–55, App. 1220).

Here, too, the commercial banking business is highly concentrated. The three largest banking organizations in the Spokane metropolitan area hold 92.3 percent of the area's total deposits (GX A–55, App. 1220) and 92 percent of the area's outstanding bank loans (GX A–58, App. 1223). The following table (derived from GX A–55, App. 1220, and GX A–58, App. 1223) shows the distribution of total deposits and total loans for the six banking organizations operating in the Spokane metropolitan area:

[7] These organizations and their shares of Spokane County bank deposits are: Washington Bancshares, Inc. (40.3 percent), Seattle-First National Bank (31.5 percent), and Washington Trust (17.8 percent) (GX A–52, App. 1217).

[Dollar amounts in thousands]

Banking organization	Deposits	Percent of total	Loans	Percent of total
Washington Bancshares, Inc.[1]	$716,340	42.1	$144,197	35.9
Seattle-First National Bank	162,220	31.6	123,976	34.2
Washington Trust Bank	85,464	18.6	65,159	18.0
American Commercial Bank	15,739	3.1	10,077	2.8
Farmers and Merchants Bank	12,558	2.5	7,583	2.1
Pacific National Bank of Washington	11,152	2.2	11,296	3.1

B. THE ACQUIRING BANK

The National Bank of Commerce, a wholly-owned subsidiary of Marine Bancorporation, Inc. ("Marine"), a registered bank holding company, is the second largest banking organization in the State of Washington. As of December 31, 1971, NBC had total deposits of $1.6 billion (22.8 percent of total deposits held by Washington commercial banks), total assets of $1.8 billion, and total loans of $881.3 million (21 percent of total loans of Washington commercial banks) (GX A–2, App. 1149). NBC operates 107 branch banking offices; 31 in Eastern Washington, located in all but two of the 20 counties there (P.T.O., Admitted Facts IV, App. 366–368, GX A–23, App. 1173–1176).

Although NBC does not operate a branch office in the Spokane metropolitan area, Spokane is a market which NBC has considered attractive and sought to enter for many years (see *e.g.*, Tr. 742–743, App. 876–877, GX F–27, App. 1276). NBC had knowledge of the Spokane banking business through its past and existing business relationships in that market (P.T.O.,

[1] Washington Bancshares, Inc., a bank holding company, owns Old National Bank of Washington, and First National Bank of Spokane, both of which operate offices in the Spokane metropolitan area.

Admitted Facts IV, App. 366).[*] As of January 31, 1972, NBC derived $4.4 million in deposits from and had outstanding $10.2 million in loans to customers in Spokane (P.T.O., Admitted Facts IV, App. 366–367).

In its 1970 annual report, Marine reported that with the proposed merger, NBC was within "sight of one of its long-sought goals; representation in the city of Spokane" (GX D–6, p. 5, App. 1270). Indeed, in their economic brief in support of this merger, the parties stated that if NBC "is to maintain its present relative position with its competitors and maintain the business of its major national customers, [NBC] *must* have representation in Spokane, the state's second largest city" (GX L–1, p. 47, App. 1743; emphasis added). They pointed out that several economic factors linking Seattle and Spokane "emphasize the need for a banking system with representation in both

[*] NBC operates two branch offices in Spokane County, one in the community of Deer Park, 20 miles north of Spokane, and one in the community of Medical Lake, 15 miles west of Spokane (GX L–1, p. 43, App. 1739). These two offices, located in rural areas, had combined deposits of $11.7 million as of January 31, 1972. Although they derived some business from Spokane, they are not part of the Spokane commercial banking market (P.T.O., Admitted Facts IV, App. 366–367).

Another Marine subsidiary, Coast Mortgage Company, a mortgage banking firm, entered the Spokane market in 1972 after the Board of Governors of the Federal Reserve System authorized Marine to open a branch office of Coast Mortgage in Spokane. The Board had previously denied it permission to acquire a Spokane mortgage banking firm (P.T.O., Admitted Facts VIII, Exhs. E & F, pt. II, App. 368, 415, 427).

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Seattle and Spokane. Conversely [these factors] emphasize the disadvantage at which banks without such representation operate" (*id.*, at p. 18, App. 1714). Peoples National Bank of Washington, which has no representation in Spokane, is the only other banking organization among the five largest in the state that is currently operating at such a "disadvantage."[10] Peoples National Bank is approximately one-third as large as NBC (GX A–2, App. 1149).

C. THE ACQUIRED BANK

Washington Trust, the acquired bank, is the eighth largest banking organization with headquarters in Washington (GX A–2, App. 1149). As of December 31, 1971, it had assets of $112 million, total deposits of $95.6 million and loans of $57.6 million (*ibid.*). It ranks fourth in terms of total deposits among banking organizations operating in Eastern Washington (GX A–19, App. 1167), and third among banking organi-

[10] Of the five largest banking organizations in Washington NBC is the only one that is not represented in three of the four largest cities in the state (Spokane, Tacoma and Everett—Seattle is the largest) (P.T.O., Admitted Facts I, Exh. A, App. 365, 398). Seattle-First National Bank and Pacific National Bank of Washington are represented in all four cities; Peoples National Bank of Washington is represented in Seattle, Tacoma and Everett; and Washington Bancshares, Inc. (Old National Bank of Washington and First National Bank of Spokane) is represented in Seattle and Spokane (GX A–54, App. 1219, GX A–67, App. 1232, GX A–68, App. 1233, GX A–69, App. 1234).

zations operating in the Spokane metropolitan area, where (as of December 31, 1971) it operated 17.4 percent of the area's 46 banking offices (GX A–54, App. 1219). It is one of only 12 middle-sized banks in Washington (*i.e.*, banks with assets in the $250 million to $30 million range) (GX A–2, App. 1149) capable of expanding into other local markets.

Washington Trust is a well-managed and growing banking institution. In the five years preceding the approval of the proposed merger its deposits increased by 50 percent, and its market share by 2 percent, while the market share of its larger competitor, Seattle-First National Bank, had declined by approximately 6 percent (GX A–55, App. 1220). Similarly, its total loans increased 70 percent from December 1966 to June 1972, an increase in its share of total bank loans of about 1 percent (GX A–58, App. 1223). Washington Trust's officers were paid at rates at least comparable to those paid by the state's largest institutions (see, Tr. 829, App. 927), and the bank had recently introduced several new services (Interr. No. 9, App. 44–52).[11]

At the time of the proposed acquisition, as a report made for Washington Trust by a banking consultant indicated (GX M–2, pp. 8–9, App. 1765–1766), the

[11] Washington Trust had options to purchase stock in two other banks in Eastern Washington (Interr. No. 48, App. 87–89); and its officers had assisted in the organization of a third bank (Tr. 849–851, App. 938–940). An officer of Washington Trust is a member of the board of directors of two of the three latter banks (Interr. No. 53, App. 89–90).

bank was ready to expand beyond the Spokane market and play a larger role in the state by making "small" acquisitions.[12] This report emphasized Washington Trust's "youthful and capable management" (GX M–2, p. 8, App. 1765), and an earlier preliminary report noted the bank's "young and eager staff" and the "leadership" of its top two officers as "important resource[s]" of the bank (GX M–1, p. 3, App. 1755).

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[12] The report stated that (GX M–2, pp. 8–9, App. 1765–1766): "* * * the bank is ready to move to a new plateau of activity. The bank has a strong business background, a healthy capital structure and earning power, youthful and capable management, and a good chance of improving its prominence state-wide. There are undoubtedly more branches to be added in Spokane (county and city) and more accounts to attract at existing locations; but the bank is ready for more than that. It is time to consider the bank's role state-wide.

If the bank is to grow through smaller acquisitions, then these should be on the basis of as even an exchange as is possible in terms of earnings and book value. Ephrata [*i.e.*, Security Bank of Washington at Ephrata, Washington, see Interr. No. 48, App. 87–89] would be a good merger on such a basis, as would any possibility in the Southwestern "Inland Empire." If only holdup prices are possible, however, then serious thought should be given first to a merger with a sizeable coastal institution so that the maximum potential value of present Washington Trust stockholders can be realized. If the only possible partner is National Bank of Commerce, then smaller interim acquisitions should be cautious to guard against potentially serious anti-trust problems. As N.B.C. is a high-risk merger possibility from an antitrust standpoint, other possible merger partners should be cultivated. In any event, the Washington Trust Bank, all things considered, appears to have outgrown the potential of Spokane."

D. THE SPOKANE METROPOLITAN AREA—THE LOCAL GEOGRAPHIC MARKET

The district court found that the city of Spokane and the populated areas immediately adjacent to it ("the Spokane metropolitan area") constituted the relevant geographic market (F. 13, App. 1934). This is the second largest city in Washington and the largest city in eastern Washington (P.T.O., Admitted Facts VIII, Exhs. E & F, pt. IV, App. 368, 415, 427). As appellee banks pointed out in the economic brief they submitted to the Comptroller in support of the proposed merger (GX L–1, p. 19, App. 1715): "The economic influence of the city of Spokane reaches far beyond the borders of Spokane County. The city has developed as the center of a regional trade territory popularly known as the Inland Empire, encompassing portions of four states and bounded by major mountain ranges."

Spokane is also the center of a more narrowly defined area ("the Spokane Trade Area") with which it has closer economic and commercial ties. This area includes 17 Washington counties located east of the Cascade Mountains, and counties in Idaho and Montana (*id.*, at p. 20, App. 1716). Agriculture, mining and forestry are major industries in this area, and Spokane, "[c]entrally located in the Trade Area, * * * has become the focal point for wholesale and retail trade" (*id.*, at pp. 21–22, App. 1717–1718).

Spokane's economy is healthy and growing. According to Washington Trust's 1972 report to its stockholders, "Spokane County has held the gains achieved during five years of healthy growth from 1965 through 1970 despite reduced activity in manufacturing industries. General business activity can be described as nothing less than very good" (GX D–1, p. 1, App. 1265). Various economic indicators in the record show that this optimism for Spokane's future is well justified.

Employment figures show that Spokane's [13] economy has become more diversified over the years (Tr. 231–223, App. 577–578, GX O–3, App. 1822), and that although Spokane's economy has undergone four "cycles" since 1950, it is now in a period of expansion (following periods of expansion, recession and recovery) (Tr. 225–226, App. 573–574). Total employment in Spokane has increased about 20 percent since 1962 (GX O–3, App. 1822), its population has been increasing moderately (GX O–1, App. 1820), and the number of housing units authorized per year has increased sharply from less than 1,000 in the years 1962–1964 to more than 4,000 in 1971 (GX O–11, App. 1829). The government's expert concluded from these data that Spokane will experience steady economic growth in the near future (Tr. 253, App. 590).

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[13] The data in the text relating to Spokane's economy are data for the Spokane Standard Metropolitan Statistical Area, which is Spokane County and is larger than the Spokane metropolitan area. These data are the most conveniently available, and provide a good base for evaluating trends (Tr. 229–230, App. 576).

In addition to this general economic growth, the banking business in the Spokane metropolitan area has grown substantially. From December 1966 through December 1971, total deposits held by banks in that area increased approximately 32 percent from $379 million to $500 million, and total loans held by these banks increased approximately 38 percent from $224 million to $319 million (GX A–55, App. 1220, GX A–58, App. 1223). During this period all the banks in the Spokane metropolitan area operated profitably (GX A–65, App. 1230),[14] and the combined income of all the banks in the Spokane metropolitan area increased steadily (GX A–66, App. 1231).

E. STATE BANKING LAW AND THE AVAILABLE MEANS OF ENTRY INTO THE SPOKANE MARKET

Washington law[15] permits banks to open branches only in (1) the city in which their headquarters are located, (2) the unincorporated areas of the county in which their headquarters are located, and (3) incorporated communities which have no banking office. Branching into other areas is permitted by the acquisition of an existing bank or banking office. Banks in the State of Washington, however, have entered *de novo* into areas foreclosed to branching by sponsoring the organization of an affiliate bank, and later acquiring the bank. This method of expansion is a legal (Tr. 732–733, App. 870, Tr. 289, App. 610) and a

[14] The Pacific National Bank of Washington, however, had a loss for the year ending December 1966 (GX A–65, App. 1230).
[15] RCW 30.40.020.

well-recognized practice used by large statewide banking organizations (Tr. 280–298, App. 604–616, GX I–3, I–4b, I–4d, I–4e, I–5, I–6b, I–7, I–8a, I–8b, I–9a, I–9b, I–10a, I–10b, I–11a, I–11b, I–11c, I–11d, App. 1350–1352, 1354, 1356–1361, 1363–1375), and recognized by the federal banking authorities.[16]

Since NBC's headquarters is in Seattle, it is legally barred from opening a branch in Spokane. In order to enter the city, it would have to do so by acquisition. Apart from entry by purchase of a large market share—the method attempted in this case—there were two significant possibilities: (1) acquisition of a sponsored bank formed by NBC officers, directors, or their associates as an independent firm to be assisted by NBC until acquired and converted into a branch; or (2) acquisition of a smaller bank.

In the last decade, the sponsored bank procedure has become an established method by which national banks enter new markets in Washington. Under that

[16] GX H–1, H–3 through H–15 (App. 1288–1290, 1293–1345), show that all three federal bank regulatory agencies are aware of the practice among major Washington banks of sponsoring new banks in furtherance of their expansion programs. These agencies have never questioned the practice when considering specific applications by national banks in Washington. Indeed, the Comptroller of the Currency, in his statement approving the application of Old National Bank of Washington to purchase Tri-Cities National Bank of Pasco, noted that the latter bank is "a satellite of the purchasing bank, opened in 1961 to provide the purchasing bank with access to the Pasco area" (GX H–8, App. 1315). As the Federal Deposit Insurance Corporation pointed out in its report to the Comptroller of the Currency on that proposed acquisition, "Under applicable branching laws restricting the establishment of *de novo* branches, Old National [the purchasing bank] can enter Pasco only through merger or the absorption of an existing bank" (GX H–10, App. 1324).

procedure—as is shown by the experience of Old National Bank of Washington discussed below—the sponsored bank must first be chartered by the Comptroller as an independent national bank. It must be operated for a period of time as a *bona fide* and independent institution, although it may be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support. It may be acquired by its sponsor, with the Comptroller's consent, after it has become established in the community it serves.

Old National Bank of Washington has used the procedure on five occasions (Tr. 280–298, App. 604–616), and the record shows that the Comptroller was fully informed of the sponsoring bank's intentions prior to the filing of three of the four applications for national bank charters (Tr. 288–289, App. 609–610, and see n. 16, *supra,* p. 16).[17] Indeed, in one instance, officials of the Comptroller's Office actually suggested this procedure (Tr. 288–289, App. 610).

Officers of NBC themselves considered sponsoring an affiliate in several instances.[18] NBC itself sponsored the formation of an affiliate in a strategically located shopping center in South Central Washington, the Columbia Center National Bank, for the purpose of acquiring it in the future.[19]

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[17] The Comptroller was not informed of Old National Bank's intention to acquire a state bank it had assisted in forming until after that bank had been formed (Tr. 288, App. 609–610).

[18] GX I–3, I–4d, I–4e, I–5, App. 1350–1352, 1356–1361.

[19] Tr. 730–731, App. 869, GX J–20, J–37, GX K–36, K–70, K–93, App. 1396, 1413, 1514–1515, 1573–1575, 1694, Dep. A. Price, pp. 71–72, 101, App. 286, 305, Dep. D. Loney, 43–44, App. 357–358.

F. THE PROCEEDINGS

1. *Agency Reports and the Comptroller's Decision*

In February 1971, Marine, NBC, and Washington Trust agreed to merge the latter into NBC and subsequently applied to the Comptroller of the Currency for approval of the merger. Pursuant to 12 U.S.C. 1828(c), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Department of Justice furnished reports to the Comptroller on the competitive effects of the proposed merger. The Board of Governors concluded that the merger "would increase the already high level of concentration of banking resources in Washington," and that the overall effect on competition would be "adverse" (P.T.O., Admitted Facts I, Exh. C, App. 365, 408–410). The Federal Deposit Insurance Corporation similarly concluded that the proposed merger would "add significantly to the already high level of commercial bank concentration which exists in the state of Washington," and that it "would have a substantially adverse effect" on competition (*id.*, Exh. D, App. 411–413). The Department of Justice reported that the proposed merger would have a "significantly adverse effect on competition" (*id.*, Exh. B, App. 403–407). The Comptroller, however, approved the merger on September 24, 1971 (*id.*, Exh. A, App. 398–402).

On October 22, 1971, the United States filed its complaint challenging the merger. Consummation was stayed automatically pursuant to 12 U.S.C. 1828(c)(7)(A), pending the termination of the suit. The Comp-

troller intervened as a party defendant under 12 U.S.C 1828(c)(7)(D).

2. *The District Court's Oral Ruling.* After the trial and final oral argument, the district court ruled for the defendants from the bench (Tr. 1195–1210, App. 1138–1147). The court indicated that it found the defendants' expert witnesses to be more credible than the government's witness with respect to the nature of competition in banking (Tr. 1195–1197, App. 1138–1139). It apparently agreed with the defendants' experts that there was little likelihood of *de novo* or "foothold" entry by NBC into Spokane and that NBC did not influence the Spokane banking market from the "wings" (Tr. 1197–1198, App. 1139–1140).

The court found that the government had not sustained its burden of proving anticompetitive effects (Tr. 1200–1201, App. 1141). It stated that economic growth in Spokane was likely to be "slow and moderate;" that banking competition was different from competition in other industries; and that Spokane was "well banked" and did not need another bank "to go in there on a new basis to make competition" (Tr. 1201–1203, App. 1142–1143). The court also indicated that only the Spokane area could be affected by the merger (Tr. 1205–1206, App. 1143–1144). Finally, with respect to the convenience and needs justification authorized by the Bank Merger Act, 12 U.S.C. 1828(c)(7)(B), the court remarked "that a need has been established, and how great a degree I am not prepared to say, but there is a need, but I don't think it is necessary to show the need because I don't see any anti-

competitive effect of the merger" (Tr. 1206, App. 1144).

3. *The District Court's Findings and Conclusions.* The court subsequently adopted, without change, the defendants' proposed findings of fact and conclusions of law. These findings rejected the claim that banking in the Spokane metropolitan area was not competitive. The court concluded that although three banks held 92 percent of the area's deposits, "other structural factors * * *, such as the number of banks and the number of banking offices in the market area, together with the actual performance of the market," as observed by defendants' experts, established that regardless of market share data Spokane was a "highly competitive market" (F. 22, App. 1940).

The district court also found no likelihood that NBC would enter Spokane *de novo* or by foothold acquisition and that there was no feasible method by which NBC could enter Spokane other than by acquiring Washington Trust (F. 19, App. 1936). It found that no bank office or bank that was reasonably acceptable to NBC was available for acquisition (F. 19 (a), App. 1936–1937). In addition, the court found that Spokane's growth would be too slow to justify "starting from scratch or from a minimal foothold" (F. 19(b)C, App. 1938). It also found that entry *de novo* or by foothold acquisition would have little competitive impact in Spokane (F. 20, App. 1939).

The district court rejected the government's claim that the termination of Washington Trust's independent existence may substantially lessen competition because it would eliminate a vigorous independent mid-

dle-sized banking institution capable of entering other markets in the state or merging with other banks of similar size. The court found that there was no "reasonable probability" that "WTB will expand into other banking markets in eastern Washington or that WTB has the incentive or capability to do so," or that it would combine with other middle-sized banks (F. 23, App. 1940).

The court also rejected the government's contention that the merger would adversely affect banking in the State of Washington by strengthening the dominance of the state's few large banking institutions. The court ruled that since banking is an inherently local business, neither the state nor Eastern Washington "constitutes a commercial banking market or a relevant geographic market" within which to consider competitive effects (F. 14, App. 1934–1935).

Finally, the court found that the benefits to the "convenience and needs" of the Spokane community that the proposed merger would provide clearly outweighed any anticompetitive effects it might have. Under the Bank Merger Act of 1966, 12 U.S.C. 1828 (c)(7)(B), this finding constitutes an affirmative defense to a merger that otherwise would violate Section 7. The "convenience and needs" finding was based on the effects of the merger in eliminating Washington Trust's competitive disadvantage from being unable to offer all the services being offered by the largest banks in Spokane, such as international banking, government insured mortgage financing, and student loans (F. 25, App. 1941–1950).

SUMMARY OF ARGUMENT

I

The acquisition by the second largest bank in the state of Washington, NBC, of the third largest bank in Spokane, may substantially lessen competition in Spokane, in Eastern Washington, and in the state as a whole. The acquisition will eliminate NBC as a perceived and actual potential entrant in Spokane, and consequently will have adverse effects on the regional and state-wide structure of banking in Washington.

The purpose of Section 7 is to prevent changes in the structure of industries which threaten anticompetitive consequences. Elimination of both actual and perceived potential competitors is such a change, because such competitors are factors in the market's structure. A perceived potential entrant waiting in the wings may influence the behavior of those in the market. An actual potential entrant can deconcentrate the market by independent entry and bring more competitive vigor to it by competing vigorously to enlarge its market share.

The test for determining whether someone is an actual potential entrant is whether, considering all the circumstances, independent entry in the future is a reasonable choice for prudent management if entry by a large acquisition is not available. This depends upon the market's prospects for growth and for profitable operations, and upon the legal, technological and financial capabilities of the firm in the light of its

past expansion. The same factors apply to determination of both perceived and actual entrants. This determination must be based upon such objective criteria and not upon statements by the acquiring firm's management respecting its future intentions for independent entry.

Elimination of either aspect of potential competition may have adverse competitive effects not only in local banking markets, but in larger, economically distinct areas such as geographically separate regions like Eastern Washington and the state itself. These are not customer-seller banking markets, but nevertheless they are statutory "sections of the country." The state so qualifies because state banking laws insulate it from outside entry and confine bank expansion within it. As the state's banking markets become dominated by the same few large institutions, which then encounter each other in most of a state's major banking markets, competition in the state as a whole may be lessened. Local oligopolistic structures and patterns of behavior may then become linked, projecting that structure and behavior throughout the state.

II

By objective criteria NBC was a potential entrant into the Spokane banking market. It was one of only two Washington banking organizations capable of independently entering Spokane. Its interest in entry there is undisputed. Its substantial resources and history of expansion demonstrate that it has the capability to enter.

It was not legally barred by Washington law from entering Spokane. Although it cannot establish branches there *de novo*, it could sponsor the chartering of a *bona fide* independent bank, in which its parent holding company could own up to 25 percent of the equity. When that bank became established in the local market, NBC could acquire it. This procedure is lawful, has been used by another large Washington bank and is being used by NBC at Columbia Center, Washington. It is also acceptable to Federal banking authorities, including the Comptroller of the Currency. There are also in Spokane two state chartered banks offering solid footholds in the area which NBC might acquire.

Documentary evidence also shows that NBC was a perceived potential entrant whose "closing in around Spokane" was causing concern to banks there.

III

The anticompetitive effects of the acquisition are substantial. The district court misconceived these effects because it concluded that despite Spokane's intensely concentrated banking structure, it was a highly competitive market. This approach is contrary to *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and to documentary evidence showing close relationships among the large banks in the state, which confirms the anticompetitive consequences of concentrated banking structures.

Moreover, the expert testimony relied on by the district court rested on factors other than competition. It was concerned with such factors as the ratio of banking offices to population and with the "adequacy" of local banking service. But Section 7 is concerned with promoting competition, *i.e.* the struggle between independently managed banking organizations. Bank-office-population ratios do not reflect competition, but only customer convenience.

The merger will also eliminate Washington Trust, a strong healthy bank with good prospects for expansion, as an independent competitive factor capable of challenging the state's major banks in Spokane and Eastern Washington. In addition, the merger will add Spokane to the number of local banking markets where the state leaders, each possessing a large local market share, encounter each other. In this way, the merger contributes to the creation of a state-wide structure dominated by a few large banks and linked by common oligopolistic interests.

IV

The anticompetitive effects of the acquisition are not outweighed by the special defense created by the Bank Merger Act of 1966, 12 U.S.C. 1828(c)(5)(B), "the convenience and needs of the community to be served." Since the district court did not properly determine the competitive effects, it could not properly balance them against the benefits claimed for the merger. That evaluation cannot be made on an abstract, assumed hypothesis of adverse competitive effects.

Moreover, the benefits found by the court are insufficient to establish the defense. It is not satisfied by the claim that substituting a larger firm for Washington Trust might counter-balance the other large statewide bank in Spokane. Such a test would lead rapidly to domination of banking markets by a few large organizations, a purpose never contemplated by Congress. The other benefits claimed, such as improved availability of loans in excess of $1,000,000, international banking services and municipal bond financing, are available in markets larger than the Spokane area. Services such as agricultural, mining, and student loans benefit only a small segment of the community, and they are all available through alternative sources in the area.

ARGUMENT

This case involves the application of Section 7 of the Clayton Act to the acquisition of a bank with a large market share in the concentrated Spokane banking market, by one of the largest banks in the State of Washington.[20] The government contends that the acquiring bank is a potential competitor in the Spokane market and that the effect of its entry into that market by acquisition of a large market share may be substantially to lessen competition by eliminating both an actual potential entrant and a perceived potential entrant which is likely to influence the conduct of bankers in that market.

[20] Similar issues were presented in *United States* v. *First National Bancorporation*, affirmed by an equally divided court, 410 U.S. 577.

We submit that the district court disregarded the significance of banking concentration, contrary to the principles of *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363. It improperly gave greater weight to subjective than to objective evidence in determining whether the acquiring bank is a potential competitor. It failed to consider the effects of the merger upon competition in Eastern Washington and the State as a whole. It erred in assessing the anti-competitive effects of the acquisition in eliminating the acquired bank as a potential competitor in its region. Finally, it applied erroneous standards in assessing "the convenience and needs of the community to be served" under the Bank Merger Act of 1966, as construed in *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

I. THE EFFECT OF A BANK MERGER THAT ELIMINATES A SIGNIFICANT POTENTIAL COMPETITOR MAY BE SUBSTANTIALLY TO LESSEN COMPETITION, IN VIOLATION OF SECTION 7 OF THE CLAYTON ACT

Last Term, in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, this Court left open the question whether a merger that eliminated a potential competitor violates Section 7 if it is "challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner" (*id.* at 537). Although, as we show below (pp. 53–54), NBC was perceived as a potential entrant into the Spokane banking market by other firms operating there, that

was not the primary basis upon which this case was presented to the district court. Accordingly, we first discuss the role of potential competition in banking, and explain why the question left open in *Falstaff* should be answered affirmatively.

A. POTENTIAL COMPETITION PLAYS AN IMPORTANT ROLE IN MAINTAINING AND STRENGTHENING COMPETITION IN BANKING MARKETS

1. Section 7 of the Clayton Act was intended to bar mergers which contribute to further concentration in the structure of American business. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362–363; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 170–171; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 331–332. Because of the key role played by banking in the American economy, prevention of increases in concentration in that industry by application of Section 7 has been of special concern to Congress. This is reflected by the incorporation by Congress into the Bank Merger Act, 12 U.S.C. 1828 (c)(5)(B), and the Bank Holding Company Act, 12 U.S.C. 1842(c), of the antitrust standards set forth in *United States* v. *Philadelphia National Bank, supra*; *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 357–358; *United States* v. *First City National Bank of Houston*, 386 U.S. 361; *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

Section 7 is concerned with preventing changes in market structure that pose anticompetitive consequences. Cf. *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 334, 362. In banking, market

structure is reflected by the number and relative market shares of the banking organizations supplying "the *cluster* of products and services that full-service banks offer" (*United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 360); the geographic area in which they operate (*United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 357–359); and the insulative effect of state law on the nature of banking in local and regional markets and in the state as a whole.

This Court has heretofore recognized, although in cases not involving banking, the importance of preserving potential competition in concentrated industries. *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526; *Ford Motor Co.* v. *United States,* 405 U.S. 562; *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 577; *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *Continental Can Co.,* 378 U.S. 441, 458, 464–465; *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651.[21] Under these decisions potential competition is significant where there are only a limited number of firms with the capability and incentive to enter an already concentrated market. Such firms may be competitively important in relation to that market either because

[21] See also, *United States* v. *Phillips Petroleum Company, et al.,* D.C. C.D. Cal., No. 66–1154–F, decided November 13, 1973; *United States* v. *Standard Oil Co.,* 253 F. Supp. 196 (D. N.J.); *United States* v. *Jos. Schlitz Brewing Co.,* 253 F. Supp. 129 (N.D. Cal.), affirmed, 385 U.S. 37; *United States* v. *Wilson Sporting Goods Co.,* 288 F. Supp. 543 (N.D. Ill.); *Ekco Products Co.* v. *Federal Trade Commission,* 347 F. 2d 745 (C.A. 7); *General Foods Corp.* v. *Federal Trade Commission,* 386 F. 2d 936 (C.A. 3), certiorari denied, 391 U.S. 919.

they are a source of future deconcentration by independent or "foothold" entry [22]; or because such firms may be an external factor influencing the conduct of those already in the market [23], or both.

An actual potential competitor is a firm that, were it not for the acquisition, would be likely to enter the market independently or by foothold. The determination whether a firm is an actual potential competitor rests on whether, considering all the circumstances, independent entry in the future is a reasonable choice for a prudent management if entry by large acquisition is not available. Where a concentrated market is growing, and profit expectations in it are good, an outside firm with the legal, technological and financial capabilities to enter is a potential entrant if it would be reasonable from a business standpoint for it to attempt actual entry. Where, as here, a firm possessing such capabilities has indicated a desire to enter the market, its status as an actual potential competitor is clear.

When an actual potential competitor enters a market by acquisition of a large market share, the existing competitive structure in the market may be unchanged but the beneficial effects of potential com-

[22] "Foothold" entry means entry by a new competitor into a market through acquisition of a small competitor already operating there. See *The Bendix Corp.*, 3 Trade Reg. Rep. ¶19,288, vacated and remanded on other grounds, *The Bendix Corporation* v. *Federal Trade Commission*, 450 F.2d 534 (C.A. 6).

[23] See Bain, *Industrial Organization*, 2d ed. 1970, p. 8; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1372–1373 (1965); Areeda, *Antitrust Analysis*, 517–518 (1967).

petition are eliminated. Had the potential competitor entered independently, it would have had to compete vigorously in order to enlarge its initially small market share, thus enhancing competition among the small number of firms in the market. Moreover, if it is a strong and aggressive company, its independent entry is likely to inject new competitive vigor into the market. In addition, by adding another firm to the market's concentrated structure, it would have increased customer alternatives thereby aiding deconcentration.

Since one of the purposes of Section 7 is to " 'preserv[e] the possibility of eventual deconcentration,' " *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 279, *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 365, n. 42, and since under Section 7 "corporate growth by internal expansion is socially preferable to growth by acquisition" (*Philadelphia National Bank, supra,* 374 U.S. at 370), when a significant potential entrant enters a concentrated market by purchasing a large market share, competition may be substantially lessened even though the acquisition only substitutes one firm for another.

The existence of a substantial firm capable of entry will itself have an additional positive effect on competition if such a firm is perceived as standing on the edge of the market. The presence of such a firm affects competition because it may influence the behavior of firms already in the market. The elimination of a significant perceived potential competitor is now well recognized by this Court as creating the prob-

ability of a substantial lessening of competition within the meaning of Section 7. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 581; *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 531–532.

2. Potential competition is as important to competition in banking as in any other industry.[24] The significance of its elimination is determined by the same criteria, namely, it "must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *United States* v. *Continental Can Co., supra,* 378 U.S. at 458; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 357–358; *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 360, 365.

Because local banking markets can support only a limited number of banks, such markets inherently tend to be concentrated. The preservation of potential competition in both its aspects is, therefore, particularly important to the local, regional, and statewide competitive structure of banking. Indeed, a leading expert in state and federal bank regulation has recently written that "the potential competition standard may be the only criterion available to the bank regulatory agencies or the courts by which a trend

[24] Rhoades, *Some Observations on Potential Competition in Banking.* Proceedings of a Conference on Bank Structure and Competition, p. 79, Federal Reserve Bank of Chicago (1972).

toward a market dominated by only a handful of banks or bank holding companies may be checked." [25]

B. THE ELIMINATION OF A SIGNIFICANT POTENTIAL COMPETITOR MAY HAVE ANTICOMPETITIVE EFFECTS IN BANKING ON A REGIONAL AND STATE-WIDE BASIS

Adverse competitive effects of market extension mergers by banks may be felt in the state as a whole, or in economically distinct regions of the state, such as Eastern Washington, as well as in local markets like Spokane. Such areas are not banking markets, *i.e.*, areas within which most customers may conveniently find sellers of banking services. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357–359. They are, however, "section[s] of the country," economically differentiated from other areas, within which the merger may "substantially lessen competition." Since the purpose of defining a "section of the country" under Section 7 is to focus upon the geographic area where the merger will have a significant impact upon competition (*United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549–550), it is necessary to consider the effect of this merger in those broader areas.

State boundaries delineate a distinct area within which banks are legally insulated from competition by

[25] Frank Wille, then New York Superintendent of Banks, now Chairman, Federal Deposit Insurance Corp., in foreword to Kohn and Carlo, *Potential Competition: Unfounded Faith or Pragmatic Foresight?* (New York State Banking Department, 1970).

banking institutions located outside the state.[25] For example, Washington does not permit out-of-state banking organizations to do business there, and surrounding states have similar restrictions. Banks in the state are required to confine their market extensions (*i.e.*, the establishment or acquisition of banking offices in local banking markets where they have not previously competed) within the state boundaries. If, as a result of mergers and acquisitions, the same few large institutions face each other in most of the state's major local banking markets, then competition in the state, as a "section of the country" larger than the banking markets within it, may be substantially lessened. (Tr. 75–77, 133–134, 139, App. 487–488, 520, 523).

Oligopolistic behavior in local banking markets will not be limited by the threat of potential *de novo* or foothold entry by other banks, since the significant potential competitors in the state, *i.e.*, the major banks in local markets capable of expansion elsewhere, will have been eliminated by merger. Thus in this case the acquired bank is being eliminated as an independent potential entrant into other local markets in Eastern Washington. Moreover, once the same few banking institutions have purchased large market shares in most of a state's local banking mar-

[25] Very large banking customers, such as national corporations, and very large banks, serving such customers, can be said to operate in regional and national banking markets irrespective of state boundaries, since convenience of access is not a limiting factor at this level. For the vast bulk of banking customers, however, convenience is the key element in defining banking markets. See *United States* v. *Philadelphia National Bank*, *supra*; *United States* v. *Phillipsburg National Bank*, *supra*.

kets, the local oligopolies in each such market may become linked. As a result, the statewide institutions may engage in more standardized, and hence less competitive business behavior everywhere, rather than risk retaliation by departing from such standards locally anywhere.[27] Moreover, even where statewide domination of most local markets by a few leading banks has taken hold, as is true in most local markets in Washington, the preservation of strong independent banks in local markets, especially in the middle sized range, can inhibit the adverse effects of any linked oligopoly among the state's leaders. Indeed, preservation of such banks may be the only means of accomplishing this result.

If the expansive drive of the state's large banks is channeled into entry into local markets by *de novo* or foothold acquisitions, they will then have to compete vigorously to enlarge their initial small market shares. They will thus bring to local markets throughout the state a new competitive force, which can challenge any entrenched positions of locally dominant banks.[28]

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[27] See, Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 89 The Banking Law Journal 116, 119 (1972); Wille, *FDIC Merger Policy*, 1970–1972, Presentation at the Practicing Law Institute Seminars on Bank Acquisitions and Mergers and Other Antitrust Problems, New York, New York, October 13–14, 1972, FDIC News Release, pp. 28–32. See also Yeats, *An Analysis of the Effect of Mergers on Banking Market Structures*, Journal of Money, Credit, and Banking, p. 623 (May 1973); and Recent Changes in the Structure of Commercial Banking, Federal Reserve Bulletin, March 1970, pp. 205 and 210.

[28] Cases under Section 2 of the Sherman Act have implicitly recognized that even though a particular firm operates in local markets, the relevant section of the country may be broader. *United States* v. *Grinnell Corp.*, 384 U.S. 563; *Otter Tail Power*

This, and the competitive potential of the acquired bank as an independent source of local and regional expansion, constitute the competition which mergers of the kind at bar will eliminate.

Such competition is likely to be eliminated in the state of Washington, in the economically distinct area of Eastern Washington, and in the immediate Spokane banking market where Washington Trust, the acquired bank, is located, if the merger of NBC and Washington Trust is permitted.

II. NBC WAS A SIGNIFICANT POTENTIAL ENTRANT INTO THE SPOKANE BANKING MARKET

A. WHETHER A FIRM IS AN ACTUAL POTENTIAL ENTRANT MUST BE DETERMINED BY OBJECTIVE EVIDENCE

It is not uncommon in Section 7 cases for a firm having both resources and incentive for independent entry to assert—as NBC did in this case—that it would enter only through the means yielding the highest return, *i.e.*, by acquiring a leading firm in the market. This Court has always rejected such evidence as providing a conclusive basis for determining whether a firm is a potential competitor.

The determination with respect to potential competition in a Section 7 case should not turn on such subjective, self-serving statements; the status of a

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Co. v. *United States*, 410 U.S. 366; *United States* v. *Griffith*, 334 U.S. 100; *Schine Theatres* v. *United States*, 334 U.S. 110. The same considerations apply to determining the "section[s] of the country" within which anticompetitive probabilities are assessed under Section 7 of the Clayton Act. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549–550.

firm as a potential entrant must be ascertained on the basis of objective evidence showing the potential entrant's financial capability to enter independently, its economic incentive to do so, and the reasonable prospects for making such an entry successfully.[29] Thus, in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175, after a full review of objective evidence showing the capability and incentive of joint venturers to enter a market independently, this Court held: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581.

The Court reiterated this view last Term in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 533–536. There it ruled that in determining whether a firm was a potential competitor on the fringe of the market, the district court should have appraised the economic facts and not been guided by the management's statements concerning its intent. It stated: "The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it was reasonable

[29] See Gilbert, *Predicting De Novo Expansion in Bank Merger Cases.* Proceedings of a Conference on Bank Structure and Competition, p. 93, Federal Reserve Bank of Chicago (1971), setting forth an economic analysis of objective operational criteria for predicting *de novo* expansion.

to consider it a potential entrant into that market." 410 U.S. at 533. Moreover, the Court specifically noted (410 U.S. at 534, n. 13) that "circumstantial evidence is the lifeblood of antitrust law, see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 221 (1939); *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, 210 (1921), especially for § 7 which is concerned 'with probabilities, not certainties,' *Brown Shoe Co.* v. *United States*, 370 U.S., at 323. As was stated in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964), '[p]otential competition cannot be put to a subjective test. It is not "susceptible of a ready and precise answer."'"

The *Falstaff* case involved the determination of a firm's role as a potential entrant influencing conduct in the market from the wings. The standards for determining when a firm is an actual potential entrant were reserved (410 U.S. at 537). We submit, however, that the reasons for preferring objective economic evidence over subjective testimony in the "wings" aspect of potential competition apply equally to determining the likelihood of actual entry (see Tr. 97, App. 500).

Section 7 is designed to arrest concentration in its incipiency. It is therefore concerned with market structure, not management's preferences. The proper question in potential competition cases under Section 7, necessarily, is not whether management considered independent entry to be preferable to entry by acquisition, but whether independent entry is preferable to

no entry at all for a firm with the defendant's capabilities and incentives.

From the standpoint of an individual firm's management, economic decisions must be made so as to maximize profits for their company, not to create the industry structure most likely to confer the benefits of competition on the public. It is almost always easier and more immediately profitable for a firm to enter a market by purchasing a large existing market share than it is for it to engage in the competitive struggle necessary to win a significant market share by independent or "foothold" entry. "But the test in § 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of § 7 is to direct the profit incentive into channels which are procompetitive." *Falstaff, supra* (Marshall, J. concurring), 410 U.S. at 572. If management's subjective preferences are given precedence over the very economic factors which Congress intended should control those preferences, Section 7 will be seriously weakened.

Indeed, if objective criteria are not controlling, then management will never ask itself whether, if the option of entry by acquisition were not available, independent entry would nevertheless be preferable to no entry at all. It will always choose the easy road of purchasing a large market share instead of the hard road of competition.[30]

Moreover, if subjective evidence is determinative, the test for potential competition will depend heavily

[30] See Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1024 (1969).

upon elaborate proof regarding the corporate decision making process, and the trial court's evaluation of the sincerity of management's statements. This introduces an additional and highly uncertain complexity into the already complex administration of Section 7. Management officials who are committed to justification of their corporation's decision to enter a market by acquisition are often unable to give disinterested retrospective testimony about what and how their corporation would have decided if it had not been able to make the acquisition in issue. Such testimony, however sincere, cannot overcome the effects of corporate self-interest.[31]

Despite disavowals by officials, corporate choices motivated by a legitimate concern to maximize profits by entering profitable markets often turn in pro-competitive directions when faced with an antitrust barrier to an acquisition. In our growing economy, banking organizations have strong economic incentives to expand into new markets, and where they cannot do

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[31] A subjective standard could also lead to the building of a "record" to support corporate self-interest before litigation begins. Thus it has been observed:

"The determination of what a large corporation acting through staff agencies, committees, officers and directors intends to do—not merely in the present, but at some future time as well—involves the proceedings in a vast labyrinth of evidence. Further, once the legal issues are known to astute corporate counsel, future facts as to corporate intent can be expected to be shaped under careful legal guidance to negate any inference that a corporation intended to enter any particular market which it later enters by merger" (Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 357-58 (1967)).

so by acquisition, they often are willing to do so by *de novo* entry or foothold acquisition.[32]

In addition, unless objective criteria are controlling, businessmen, their counsel and the government are unable to determine in advance whether in a case involving a firm's role as a potential competitor, an acquisition may substantially lessen competition. As this Court has noted: "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. * * * [I]n any case in which it is possible, without doing violence to the Congressional objective embodied in Section 7, to simplify the test of illegality, the courts ought to do so in the interests of sound and practical judicial administration." *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362. See also *United States* v. *Topco Associates,* 405 U.S. 596, 609, n. 10.

Finally, as *Falstaff* holds, objective evidence is the primary determinant of a firm's role as a potential entrant when the wings effect is being examined.

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[32] For example, after the Federal Reserve Board had denied NBC's parent holding company Marine Bancorporation the right to enter the Spokane mortgage banking market by acquiring a mortgage banking firm there, Marine's Coast Mortgage company applied to the Board for permission to open its own branch office in Spokane. The Board granted this authority. See n. 9, *supra*, p. 9.

A recent economic study has found that merger and branching are, for bank management, essentially interchangeable substitutes for expansion. Oldfield, *Projecting the Structure of Local Banking Markets in Pennsylvania*, in Changing Pennsylvania's Branching Laws: An Economic Analysis, p. 43, Federal Reserve Bank of Philadelphia, 1973.

Ordinarily, firms in the market will be aware of objective factors bearing on the economic incentive of others to enter, and the financial capacity of such firms to do so. But they will not be aware of a particular management's balancing of independent entry or no entry, as against entry by acquisition. Even if the outside firm publicly announces a preference for expansion by acquisition, experience teaches that such decisions are not immutable. Thus the outsider's impact "from the wings" will necessarily turn on the same objective factors apparent to any reasonable businessman that should govern whether a firm is an actual potential competitor.

B. ON THE BASIS OF THE OBJECTIVE CRITERIA, NBC WAS AN ACTUAL POTENTIAL ENTRANT INTO THE SPOKANE BANKING MARKET

1. *NBC had the incentive and capability to enter.* In holding that NBC would enter the Spokane market only by the acquisition of a large market share, the district court relied on evidence reflecting management's statements of its intentions (F. 19, App. 1936–1939).[33] The objective evidence on this issue, however, established that NBC was a significant potential entrant in the market.

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[33] NBC claimed that the high cost of providing a full service banking operation in Spokane made entry other than by acquiring a large market share uneconomical and therefore unlikely (Tr. 871–872, 879–881, 926–927, App. 951–952, 956, 982–983). It offered no supporting data, however—such as earnings projections or analyses of the deposit base and facilities required—to substantiate that claim.

Indeed, many of the services relied on by NBC for its "full service" status would not appear to require any additional in-

NBC's significance as a potential competitor was demonstrated by expert testimony that it was one of only two institutions whose entry into Spokane *de novo* or by foothold acquisition would have a substantial competitive impact (Tr. 98–100, App. 500–502, see also Tr. 936, App. 988).[34] NBC's capability to accomplish *de novo* entry was shown by its substantial resources and history of expansion. It is the state's second largest banking organization. In 1971 it had total assets of $1.8 billion, and total deposits of $1.6 billion, at least three times its 1960 assets of $586 million and deposits of $538.6 million (GX A–2, A–13, App. 1149, 1161). It has grown steadily. In 1962 it had 65 banking offices (Moody's Bank & Finance Manual 1962, p. 913). By June 30, 1970, the number had increased to 98, and two years later it was 107 (GX A–16, A–17, App. 1164 1165). Between 1962 and 1972 it had acquired four small banks in Eastern Washington (GX A–43, App. 1208).

In view of NBC's substantial resources and history of expansion, its capability as a significant potential competitor cannot be seriously disputed.

In addition to its capacity for entry, NBC had the incentive and interest to enter the Spokane market. Its

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vestment upon entry in the Spokane market. For example, large commercial loans are presently offered by NBC to a wide geographic area, including Spokane (P.T.O., Admitted Facts IV, App. 366–367). Moreover, assuming some services are unprofitable without a local deposit base, no reason appears why such services must be initially available.

[34] Since the other firm, Peoples National Bank of Washington, the state's fourth largest bank, is only one-third the size of NBC, the latter is the most significant potential entrant, and the most effective source for deconcentration.

interest in entering that market, the third largest in the state, was longstanding and conceded (P.T.O., Admitted Facts IV, App. 367). The experts on both sides agreed that Spokane is growing (Tr. 441–443, App. 698–699), although the court found its growth would be only slow to moderate (F. 19(b)C, App. 1938). While Spokane may not currently be a boom town, it is the trade center of Eastern Washington and the "Inland Empire."

There is substantial evidence that NBC had attempted to enter the Spokane market. Thus, before it acquired the Washington Trust Bank, NBC negotiated to acquire the much smaller Farmers and Merchants Bank—a three-office suburban bank with about $13 million in deposits and 2.5 percent of the market (GX A–54, A–55, App. 1219, 1220, G–2, G–3, G–8, G–9, App. 1280–1287). NBC considered the Spokane area to be a good center for the region's correspondent banking business (Dep. F. Abersfeller, Exh. 1, App. 236–238, Dep. M. Carlson, pp. 18–19, App. 147–148), an appropriate regional headquarters for its Eastern Washington branches (Dep. M. Carlson, pp. 17–18, and Exh. 3, App. 147, 155), a community to which many former NBC customers had moved (GX D–4, App. 1268), and a market which would buy NBC's international banking skills (GX D–5, App. 1269). The Chairman of NBC's holding company said that he had confidence in Spokane's future potential (Tr. 744, App. 877–878), and the acquired bank's 1971 Annual Report referred to Spokane's general business activity as "nothing less than very good" (GX D–1, App. 1265).

The record thus demonstrates that NBC possessed the resources, incentive, and desire to enter the Spokane market. Not only was NBC an actual potential entrant, but, as shown below (pp. 53–54), NBC was perceived to be a potential entrant by firms operating in the Spokane market.

2. *NBC could have entered the Spokane market by sponsoring a bank or making a foothold acquisition there.* As shown above Washington law would bar NBC from opening a branch in Spokane, since it does not have its headquarters there. The only way it could enter that market, therefore, is through an acquisition. It could have entered that way either by sponsoring a new bank and ultimately acquiring it, or by making a "foothold" acquisition of a small bank.

a. *NBC could have sponsored a new bank and then acquired it.* (1) As explained in the Statement (*supra,* pp. 15–17), the sponsorship by an existing bank of a new bank, followed by the sponsoring bank's acquisition of the new bank, has become an established method in Washington by which national banks may enter new markets in which they cannot open branches.[35]

The federal regulatory authorities, including appellee Comptroller, are aware of this practice and have never objected to it when considering specific applications by national banks in Washington.[36] The merging

[35] See Tr. 280–298, App. 604–616, GX H–1 and H–11, App. 1288–1290, 1326–1328.

[36] GX H–1, H–3 through H–15, App. 1288–1290, 1293–1345, show that all three federal bank regulatory agencies are aware of the practice among major Washington banks of sponsoring new banks in furtherance of their expansion programs.

banks, NBC [37] and Washington Trust,[38] have also been aware of the sponsorship activities of other Washington banks.

Officers of NBC themselves considered sponsoring an affiliate in several instances.[39] Moreover, NBC sponsored a new bank in South Central Washington, the Columbia Center National Bank, for the purpose of acquiring it in the future.[40] It has never been suggested that either these sponsorship activities by NBC and its officers, or the practice itself is illegal. Indeed, the district court, which adopted defendants' findings verbatim, made no determination that use of the sponsored bank procedure is barred by Washington law.[41]

Contrary to the Comptroller's contention (Comptroller's Mo. to Aff., p. 14), *First National Bank* v.

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[37] GX I-4b, I-6b, I-7, I-8a, I-8b, I-9a, I-9b, I-10a, I-10b, I-11a, I-11b, I-11, I-11d, App. 1354, 1363-1375, J-45, J46, App. 1421-1422.

[38] GX C, App. 1242-1243.

[39] GX I-3, I-4d, I-4e, I-5, App. 1350-1352, 1356-1361.

[40] GX J-1 through J-54, App. 1378-1430, GX K-1 through K-94, App. 1431-1696.

[41] During the trial, the district court rejected appellees' assertion that NBC could not legally sponsor the formation of a new national bank as a vehicle for its entry in Spokane (Tr. 732-733, App. 870):

"* * * I don't conclude * * * that there is anything civilly wrong with that approach. * * * [T]he only thing is, they had the capability, and they had done it, if that is what you are trying to prove."

* * * * *

"Well, I have no doubt about that, I had no doubt about that right from the beginning of the case. I think they can go in and they can help organize one, they can loan money and all the rest of it, and they could probably do it in Spokane. I will agree that they could do that."

Walker Bank, 385 U.S. 252, does not indicate that such sponsorship by NBC would be prohibited under the National Bank Act. That case held that the provision of that Act governing branch banking (12 U.S.C. 36(c)) permits national banks to establish branches only in accordance with state law. The establishment of a new national bank, however, even where sponsored by an existing bank, is governed by other provisions of the Act (12 U.S.C. 26, 27) which do not require compliance with state law restrictions on branch banking. This distinction between the chartering of new, *bona fide* national banks to be affiliated with existing banks, and branching by existing banks, is reflected in the decisions of other federal and state courts;[42] in the Comptroller's decisions cited above (n. 36, *supra,* p. 45), and in the subsequent history of the *Walker Bank* case itself.

In *Walker Bank,* this Court held that it was unlawful for The First National Bank of Logan to establish a *de novo* branch in Logan. The Comptroller then authorized the establishment of a new national bank (Pioneer National Bank), sponsored by persons associated with First National Bank of Logan. Subsequently, the Comptroller approved the merger of Pioneer National Bank into First National Bank of

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[42] *Ramapo Bank* v. *Camp,* 425 F.2d 333 (C.A. 3), certiorari denied, 400 U.S. 828; *Camden Trust Co.* v. *Gidney,* 301 F.2d 521 (C.A.D.C.), certiorari denied, 369 U.S. 886; *Pineland State Bank* v. *Proposed First National Bank of Bricktown,* 335 F. Supp. 1376 (D. N.J.); *Traverse City State Bank* v. *Empire National Bank,* 228 F. Supp. 984 (W.D. Mich.); *Nealley v. Brown,* 284 A. 2d 480 (Me.).

Logan, so that the latter in effect obtained the Logan office it originally sought.[43]

Since the chartering of national bank affiliates is not governed by state law, the provisions of Washington law barring a newly-chartered state bank from being acquired for ten years without the consent of the State Supervisor of Banking are also inapplicable.

Appellee banks (Mo. to Aff., p. 21, n. 15) characterize the practice of Old National Bank of Washington, a subsidiary of Washington Bancshares, Inc., of sponsoring and later acquiring new national banks in areas where it could not establish *de novo* branches, as a "violation of both state and federal law." Although they assert that the Comptroller would not have granted the charters for the national banks had he known that the plan was to obtain branches for Old National Bank, the record shows that the Comptroller was fully informed of the sponsoring bank's intention

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[43] Decision of the Office of the Comptroller of the Currency on the Application to Merge Pioneer National Bank, Logan, Utah, with The First National Bank of Logan, Logan, Utah, April 23, 1973. As the Comptroller explained in his opinion (p. 1):

"Pioneer National Bank, the merging bank, was chartered in January 1968 by persons associated with The First National Bank of Logan after an attempt by that bank to establish a branch in Logan was stifled on legal grounds [*i.e.*, this Court's decision in the *Walker Bank* case, *supra*]. Pioneer National Bank has operated as an affiliate of the charter bank since its inception and these two banks have a common directorate as well as common stock ownership; * * *."

See also, Advisory Report of the Board of Governors of the Federal Reserve System on the Competitive Factors Involved in the Proposed Merger of Pioneer National Bank and First National Bank of Logan, March 22, 1973, p. 1: "Due to Court action, the branch was closed on January 26, 1968, and a few days later Pioneer was established at that location."

prior to the filing of the applications. Indeed, in one instance, officials of the Comptroller's Office actually suggested this procedure. See Statement, *supra*, p. 17.[44]

Appellee banks suggest (Mo. to Aff., p. 20) that sponsorship of a new bank by NBC might result in the forfeiture of the charter of its parent, Marine Bancorporation, under a provision of Washington law[45] which prohibits a bank holding company from owning or controlling more than 25 percent of the stock of more than one bank. On the contrary, we submit that this statute enhances the effectiveness of the sponsored bank procedure. Under its provisions NBC's parent holding company, Marine, could acquire up to 25 percent of the stock of any bank sponsored by NBC, or itself sponsor a bank, thus assuring that NBC's owner would have a substantial, direct and legal interest in the sponsored bank.[46]

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[44] The Comptroller's approval of sponsorship and acquisition as a method of achieving *de novo* entry undermines the testimony by the Regional Administrator of National Banks, upon which appellee banks rely (Mo. to Aff., p. 19), that his office would not approve a charter application where the applicants disclosed a purpose of establishing the newly created bank as a branch of an existing bank. In any event, that testimony came in response to a question which assumed that the applicants disclosed that the "*sole* purpose" of the application was to establish a branch (Tr. 975, App. 1011). This response, therefore, has no bearing on the situation where the sponsored affiliate operates as a *bona fide* national bank for a period of time before its sponsor acquires it, as did the sponsored affiliates of Old National Bank.

[45] RCW 30.04.230.

[46] In at least 17 states during the last three years, holding companies have sponsored and acquired banks in locations not

The statute, moreover, while limiting the extent of stock ownership by a bank holding company, does not cover ownership or control by persons merely affiliated with a holding company or one of its operating subsidiaries. Thus this provision has not prevented Old National Bank of Washington and its parent Washington Bancshares, Inc., or NBC itself from sponsoring affiliates (see nn. 35 and 40, *supra*, pp. 45, 46).

Appellee banks in effect contend (Mo. to Aff., pp. 22–24) that the sponsored bank procedure is too clumsy, too slow, and too costly for effective entry into a large market. Although it is less immediately profitable than direct entry by a large acquisition, its use in the state demonstrates that it is practical. Indeed, if the sponsored bank competes effectively, it can establish new branches until it is acquired. In effect, NBC would be establishing its own target for a foothold acquisition in Spokane, and pending its eventual acquisition, NBC could assist it in branching in the city,[47] and could assure that it would be soundly managed.

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open to branching by their subsidiaries. A list giving one example from each state appears in an Appendix to this brief. The Federal Reserve Board has approved these transactions. Thirteen of the seventeen examples were national banks chartered by the Comptroller.

[47] The district court noted that since NBC's headquarters is in Seattle, once it entered Spokane either by a foothold acquisition or the acquisition of a sponsored bank, it would thereafter be unable to branch in the Spokane area (F. 19(b)B, App. 1937–1938). But, as noted above, its sponsored bank could create a number of branches before being acquired Moreover, the foothold acquisition of American Commercial Bank (discussed in the text), which has four branches, would have given

(2) The district court concluded that NBC could not enter by sponsoring a bank because it found that the Comptroller of the Currency would not grant a charter for a new national bank in the Spokane area in the reasonably foreseeable future (F. 19(b)C, App. 1938). The court relied heavily upon testimony by the Regional Administrator of National Banks that he did not believe it reasonable to assume that such a charter would be granted (Tr. 974–975 App. 1011). But since he was testifying in support of a merger his superior had already approved, and since he could state only what he would recommend, not what the Comptroller would decide (Tr. 979–980, App. 1013–1014), such evidence does not establish that NBC could not have obtained a charter for a new sponsored national bank.[48]

Indeed, if the market is undergoing reasonable growth and the existing banks are profitable, as was the case in Spokane (GX A–65 A–66, App. 1230–1231), it must be assumed that the regulatory decision will reflect the national policy in favor of market extensions by internal expansion rather than by acquisition, which is incorporated into the Bank Merger

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NBC a solid competitive base. Finally, in view of its very large existing establishment in the Spokane area—fifteen branch offices within a 100 mile radius of Spokane—a downtown base in the city itself would provide a foundation from which to service the entire region.

[48] The district court recognized that the Comptroller had given advance approval to the merger, since it stated (Tr. 1006, App. 1029): "* * * I'll take it as being the fact that [NBC] talked with the Comptroller and the chief deputy and the chief deputy or Comptroller, whoever it was, said * * * that he would look with favor on it if the application were made, that's all. I'll accept it as being the fact—that's what he said."

Act to the extent that it reiterates Section 7 (12 U.S.C. 1828(c)(5)(B)). Only if new entry might threaten the stability of existing banks could the Comptroller properly refuse to permit new competition. Yet the Regional Administrator conceded that new entry would not threaten the soundness of any Spokane bank (Tr. 998, 1014–1015, App. 1025, 1033–1034).

b. *NBC could have made a foothold acquisition of a smaller bank in the Spokane market.* There were two state chartered banks whose acquisition would have enabled NBC to make a non-anticompetitive entry into the market: The Farmers and Merchants Bank (*supra,* p. 44) and American Commercial Bank.

NBC had been negotiating to buy Farmers and Merchants prior to acquiring Washington Trust, but claimed the price was too high. American Commercial Bank has its headquarters in downtown Spokane, four branches (Tr. 506, App. 736), $15.7 million in deposits and about three percent of the market (GX A–55, App. 1220). It will be eligible for acquisition in 1975.[49] Since its stock is widely held (see GX C, Exh. C, App. 1251), acquisition thereof should not be too difficult for a determined buyer. Moreover, since it has only three fewer branches than Washington Trust, its acquisition would give NBC a solid base in the area.[50]

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[49] P.T.O., Admitted Facts VIII, Exhs. E & F, pt. X, App. 368, 421, 433. Under RCW 30.08.020(7), a state chartered bank may not, except with the consent of the state Supervisor of Banking, agree to be acquired for ten years after it is chartered.

[50] The defendants stressed the unsatisfactory experience of the state's third largest banking organization, the Pacific National Bank of Washington, whose predecessor had entered

c. *NBC was a Perceived Potential Entrant into the Spokane area.* The objective evidence showed that NBC was perceived by other banks in Spokane as a potential competitor and as such exerted a "beneficial influence on competitive conditions in that market" (*United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 533). Washington's former Supervisor of Banking testified that bankers fear entry by well financed outsiders and therefore seek to prevent it by claiming that they are adequately serving their area (Tr. 492–506, App. 728–736). NBC made its interest in entering Spokane known for many years (GX F–23, F–26, F–27, F–29, App. 1273, 1275, 1276, 1277, Dep. M. Carlson, Exh. 3, App. 154).

Documentary evidence from NBC's files showed NBC's influence on the banks in Spokane and their awareness of its presence in the wings. A memorandum written in 1962 by an official of NBC reported that "there is an air of competitive resistence toward our bank by Old National Bank and Washington Trust with reference to our closing in around the Spokane area. * * * Throughout our branch locations neighboring the Old National, it appears there is evidence of a

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Spokane by a small foothold acquisition. Some of these difficulties were attributed by a government witness to inherited mismanagement and lack of close home office attention (Tr. 511–515, App. 739–742). Another difficulty was that Pacific had lacked sufficient branches within a 100-mile radius of Spokane to provide a deposit base which would support a more viable operation there (Tr. 1133–1136, App. 1103–1104). In contrast, NBC presently has 15 branch offices within that radius (Tr. 945, App. 993), with total deposits of $103 million (GX A–23, App. 1173–1176), and already had $4.4 million in total deposits from, and $10.2 million in loans to Spokane customers (P.T.O., Admitted Facts IV, App. 366–367).

stronger competition and an inclination to cut rates" (GX B–4, App. 1240).

III. THE ACQUISITION MAY SUBSTANTIALLY LESSEN COMPETITION IN THE SPOKANE MARKET, IN EASTERN WASHINGTON, AND IN THE STATE AS A WHOLE

A. THE MERGER MAY SUBSTANTIALLY LESSEN COMPETITION IN THE SPOKANE MARKET BY ELIMINATING NBC AS A POTENTIAL COMPETITOR THERE

As we have shown (*supra,* pp. 28–33), a merger that eliminates a substantial potential competitor in a concentrated market may substantially lessen competition, in violation of Section 7. The present merger would have precisely that effect. Under the proper objective criteria for determining whether a firm is a potential competitor, NBC met those standards because it had the resources and incentive to enter Spokane; in addition, it had shown a strong interest in entering that market (*supra,* pp. 43–44, 53). The merger would eliminate NBC as both an actual and a perceived potential entrant in the Spokane market which, as we have shown (*supra,* pp. 7–8), is a concentrated one.

The district court, however, was of the view that these factors were irrelevant because of its conclusion that the Spokane banking market was in fact highly competitive so that the elimination of a significant potential entrant presumably would have no adverse effect upon competition there. It also viewed Washington Trust as a relatively weak bank, whose com-

petitive abilities the merger would strengthen.[51] Neither conclusion can withstand analysis.

1. Although the Spokane banking market is highly concentrated, with the three largest banks holding 92 percent of the deposits there (*supra*, pp. 7–8), the district court ruled that "other structural factors [beside concentration] relied on [by defendants' experts Drs. Haywood and Baxter], such as the number of banks and the number of banking offices in the market area, together with the actual performance of the market as observed by Dr. Baxter, establish as a fact that the Spokane commercial banking market is a highly competitive market, and does not suffer from parallel or other anticompetitive practices attributable to undue market power" (F. 22, App. 1940). This Court has repeatedly recognized, however, that in amending Section 7 of the Clayton Act in 1950, Congress was concerned with stemming the rising trend of concentration in American industry, and in encouraging forces that could lead to deconcentration of already concentrated markets. See, *e.g.*, *United States* v. *Phil-*

[51]To the extent that the court relied on the theory that the merger would replace Washington Trust with a bank able to compete more effectively with larger banks in the Spokane market and to provide additional services there, those were factors to be considered under the community "convenience and needs" defense, but not in assessing the competitive impact of the merger. Cf. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 182–183. As we show below (pp. 69–71), in our discussion of that defense, neither of those factors establishes the defense in this case.

adephia National Bank, 374 U.S. 321; *Brown Shoe Co.* v. *United States,* 370 U.S. 294. Congress thus sought to preserve the forces in the economy that contribute to the maintenance and strengthening of competition.

Potential competition is an important one of those forces. Although the elimination of a potential competitor through merger does not itself increase concentration in the market involved, it does have a significant anticompetitive impact because of the role that potential competition plays in strengthening competition in concentrated markets and deconcentrating them. For this reason, a merger that eliminates a substantial potential entrant from a concentrated market cannot be justified on the ground that the market in which the acquired firm operates is nevertheless currently competitive.[52] The elimination of such a potential competitor necessarily adversely affects the basic structure and organization of the market. In passing a statute that was designed to stop the trend toward increasing concentration in its incipiency (*Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 317), Congress made the judgment that in concentrated markets competition is likely to be less vigorous than in nonconcentrated markets, and that mergers that pose any significant threat to competition in concentrated markets were to be proscribed.

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[52] For example, one or two independent banks struggling to enlarge their market shares can intensify competition in a concentrated market. But this phenomenon may be temporary. See Tr. 145–146, App. 526.

The evidence in this case confirms the congressional conclusion that competition in concentrated markets tends to be less vigorous. It shows that the highly concentrated banking business in Washington was marked by interdependent behavior in an atmosphere of friendly cooperation rather than vigorous price and service competition (Tr. 72–77, 78–80, 82–84, 86–93, 131–132, 173–174, App. 485–492, 494–497, 518–520, 542–543).

For example, there were extensive references to "personal," "cordial" and "friendly" relationships among bankers in the Spokane market with respect to the possibility of new entry by NBC.[53] Evidence of

[53] See, for example, GX F–31 (App. 1278), a memorandum written by an official of NBC of a 1953 conversation with Fred Stanton, president of Washington Trust. After reporting that he informed Mr. Stanton that NBC would not be interested in purchasing a bank in Newport, a community "in Spokane's back yard," if Mr. Stanton wanted to buy it, the author states: "I was told that Mr. Stanton had heard rumors regarding the possible sale of the Newport bank and if anyone bought it he would prefer that it be the National Bank of Commerce."

In a 1955 memorandum an official of NBC states (GX F–29, App. 1277): "I asked him [Bill Scammell, Vice President of the Washington Trust Bank] how he would feel if our bank were to come into the Spokane area and he remarked that they would not object as they would like to have us as a competitor and that they have always welcomed competition. I assured him that if such a union [NBC's acquisition of Old National Bank] would ever come into being that they could be well assured that they would find the National Bank of Commerce most cooperative and they would be one of the first to be informed if we made any changes affecting both banks."

In 1961 an official of NBC reported a conversation with Mr. Fred Stanton (GX F–26, App. 1275): "Looking at me, he [Fred Stanton] said that some day the National Bank of Commerce

"friendly cooperation" was not confined to Spokane,[54] and it even extended to such matters as the treatment of simultaneous branch applications.[55]

Indeed, the appointment in 1962 of a new president of Washington Trust, the acquired bank, led to concern by NBC that Washington Trust would become a more aggressive competitor.[56] "[B]ased on information that comes to me through both friends and our own branch managers in the surrounding area," an NBC official wrote that "it would appear to me we might have to change our approach in the Spokane area" (GX B–4).

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will be in Spokane and we will be friendly competitors. It was a very personal conversation and I was complimented that he would tell me about his plans before he had even approached his directors."

[54] An NBC official reported a 1968 conversation with the president of a bank in Lynwood, Washington (GX B–1, App. 1237): "He told me that Bob Young, President of the Everett Trust & Savings Bank, had recently told him that he was 'coming your way,' to which his response was 'come ahead so long as we can compete and be friends like with NB of C at Edmonds.' This apparently is his philosophy of competition. * * * We also discussed service charges. He is moving to a 3–2–1 system which he believes will increase his profitability. * * * He indicated however, he was not interested in competing either on rate or on service charges." See also GX B–3, App. 1239.

[55] Thus, as early as 1951, an official of NBC reported (GX B–2, App. 1238) that he "told [a representative of the F.D.I.C.] under normal circumstances, where the Seattle-First and ourselves learned one had made previous application [for a branch], the other would withdraw theirs."

[56] GX B–4, App. 1240–1241. After reporting the statement of Washington Trust's new president that he intended to compete aggressively, an NBC official noted in his memorandum: "It was hard for me to believe he was serious in his remarks so later on, while visiting with Don Kirkbride at his home, I

These relationships reflect daily gatherings among the top management of the larger banks in the state at a wide variety of business functions (Dep. R. Buck, pp. 55–56, App. 126–127). "[E]very bank is represented in every one of these groups, and so it would be scarcely a day that I didn't see somebody from one of the top banks. * * * [They would say something like] 'When are you guys going to drop your savings rate instead of making it tough for us' " (*id.*, pp. 56–57, App. 127). As the government's expert, Professor Smith testified, "this would indicate that there is this rather elaborate social structure which enables bankers to discuss their rates and to discuss their business problems with one another" (Tr. 80, App. 490).

By acquiring a large market share in Spokane through acquisition, instead of by competing for it with the market leaders there, particularly the state's largest bank, Seattle-First, the acquisition will have the effect of extending to Spokane the already close working relationship between NBC and Seattle-First in Seattle (Tr. 125–126, 133–134, App. 515–516, 520).

The evidence also showed the restraints on competition that follow when leading branching banks with similar interests extend throughout the state, and encounter each other in most of the state's leading banking markets. Such banks fear the competitive reaction of locally-oriented institutions which have no concern over retaliation in other markets. In 1962, for example,

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asked him about it. Don was not quite sure that was Phil's intention but did admit that their operation has changed somewhat from the previous management of his father" (*ibid.*).

Washington Trust's aggressive young president suggested that a smaller independent bank could cut loan rates and service charges with less costs than one of the larger institutions, such as Seattle-First, Old National or NBC.[57] In another example an NBC memorandum reported a conversation between officials of NBC and Old National Bank, expressing the view that the large bank systems are "friendlier" competitors than the independent unit banks (GX B–3, App. 1239):

> Mr. Stilson [Vice President of Old National] said that as far as he is concerned where they have competition he wished it was the NB of C. He said, "We would be a lot better off if they were in Ritzville than the unit bank there, and certainly the Old National would be better off if NB of C went into Pomeroy; that there would be better co-operation between two branch banks systems than where they had a unit bank as competition."

Defendants' experts, whose views the district court adopted as more credible (Tr. 1195–1197, App. 1138–1139) than those of the government's expert, did not challenge the government's concentration data or the evidence summarized above. They characterized the

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[57] As an official of NBC reported (GX B–4, App. 1240): "Phil [Stanton] has taken an aggressive position as the bank's new President * * *. During my visit with Phil, he indicated their bank is going to be more aggressive in every way to bring in new business accounts with the intention to offer the lowest service charges of any bank in town and to cut loan rates below the other banks. It is his feeling operating as a smaller independent bank they can do this with less cost than one of the larger branching institutions such as Seattle First, Old National or ourselves."

former as only a crude indicator, and the latter as insignificant (Tr. 361–363, 377, 383, 1097, 1122–1127, App. 652–653, 660–661, 664, 1082, 1096–1099).

They concluded that, despite the high concentration in the Spokane market, it was structurally competitive because of the number of firms there and the large absolute size of some of them (Tr. 350, 382–383, 1035–1036, 1094–1095, App. 645, 663–664, 1046, 1080). They stated that, based on comparisons of ratios of banks and banking offices to population in Spokane and cities of similar size, Spokane was adequately banked because its ratio was below the national average (Tr. 355, 1045–1046, 1092–1093, App. 648, 1052–1053, 1079).

The district court accepted those views (F. 22, App. 1940), stating in its oral opinion: "Well now, Spokane is well banked, let's put it that way, it doesn't need another bank, a new one to go in there on a new basis to make competition in that market" (Tr. 1203, App. 1143).

This conclusion completely misconceives Congress' purpose in requiring that bank mergers must pass "muster under the antitrust standards of * * * [*Philadelphia National Bank*], which were preserved in the Bank Merger Act of 1966." *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 357–358. That standard does not turn upon "adequacy" of banking resources, but upon competition. The unique standard the district court adopted—comparisons of ratios of population to banks and banking offices in various cities—is not a measure of competition.

The proper measure of competition is not the total number of banking offices, but the number of independent banking organizations that operate such offices. A community in which all the banking offices are operated by a single firm is obviously not competitive even though the office-population ratio is high. The district court's theory thus does not properly define competition, but simply describes convenience of access by customers to banking offices.

Moreover, variations in local markets and state law governing branching make impossible meaningful comparison of such ratios. (Tr. 1073–1076, App. 1068–1070). If such data were the standard, the test for the validity of acquisitions would not be whether competition among ~~such data were the standard, the test for the validity~~ banks may be lessened, but whether customers had convenient access to offices. Reliance on such a standard is therefore inconsistent with both the purposes of Section 7, and its authoritative construction by this Court before and after the Bank Merger Act of 1966 in *Philadelphia National Bank* and in *Phillipsburg National Bank*.[28]

Moreover, the conclusions of defendants' experts that the Spokane market is competitive were not supported by an analysis of the competitive performance of the Spokane banking market (Tr. 411, App. 679–680). To be meaningful, such an analysis would have had to show comparisons of such matters as rates and costs for various services, and to have considered other indicia of

[28] Defendant's expert Dr. Baxter offered the same views in the *Phillipsburg* case. The Court's reaffirmation there of *Philadelphia Bank* would appear to be a definitive rejection of this approach.

competition, such as whether profits were above competitive levels. Defendant's experts, however, relied almost entirely upon subjective conclusions drawn from conversations with bankers and others (Tr. 409–410, 1034–1035, App. 679, 1045–1046); and upon their concepts of an adequately banked market as shown by ratios of population to banking offices.[39]

2. The district court viewed Washington Trust as a "limited service" bank (F. 16, App. 1935) which was competing inadequately against the large statewide "full service" institutions (Seattle-First and Old National Bank) already in Spokane. Yet it was stipulated that Washington Trust is a sound and well-managed institution for its size; (P.T.O., Admitted Facts V, App. 367); and the record showed that it was doing extremely well. It was the area's third largest bank. In the preceding five years its deposits had increased by 50 percent and its market share by 2 percent, while its larger competitor, Seattle-First, had suffered a 6 percent decline in market share. It was profitable, aggressive and capable of expansion beyond Spokane. Its officers were paid at rates com-

[39] Part of the district court's error may have arisen from its view that assessment of the expert testimony before it simply turned on questions of "credibility" (Tr. 1195–1197, App. 1138–1139). We submit, however, that the issue was really whether the economists' analyses rested upon and reflected the kind of evidence which accords with the purposes of Section 7 and this Court's interpretation of it in prior cases. If Congress were to substitute a standard of "adequacy" in banking markets for the present standard of competition, testimony of the kind presented by defendants' experts might be entitled to great weight. Under Section 7 standards, however, it was not sufficient.

parable to those paid by the state's largest institutions; it had introduced several new services; and it offered all but a few specialized banking services. See Statement, *supra*, p. 11; Tr. 824–830, App. 924–928.

Moreover, a report made by a banking consultant for Washington Trust concluded that it could expand beyond the Spokane market and should play a larger role in the state by making small acquisitions. The report emphasized its "young and eager staff" and its vigorous leadership, and concluded that Washington Trust "appears to have outgrown the potential of Spokane." See Statement, *supra*, p. 12, n. 12.

The State's former Supervisor of Banks corroborated this evidence; he testified about the soundness of Washington Trust and its potential for expanding outside the Spokane market (Tr. 544–545, App. 758).

The few services Washington Trust did not furnish were not of great competitive significance, for they necessarily are required only by a very small percentage of Spokane's commercial bank customers (see, *infra*, pp. 70–71). Loans greater than its $1.25 million limit, emphasized by the district court (F. 16, App. 1935), involve competition which occurs in a much larger area than a single city. Indeed, a principal witness introduced by the Comptroller to show a competitive need for this service came from outside any of the sections of the country involved (Tr. 622–630, App. 804–809).

Washington Trust is thus a thriving and important banking institution in the Spokane market, which was reasonably likely to expand beyond that market. As we now show, one of the anticompetitive consequences

of the merger was to eliminate that likelihood of such expansion.

B. THE EFFECT OF THE MERGER MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN EASTERN WASHINGTON AND IN THE STATE AS A WHOLE

As we have explained above (pp. 33–36), both Eastern Washington and the State as a whole, although not traditional banking markets, nevertheless are relevant sections of the country within which to consider the competitive impact of the merger. We submit that the effect of the merger may be substantially to lessen competition in banking in both of those areas.

As we have shown (Statement, *supra,* pp. 5–6), five of Washington's 90 national and state banking organizations hold 74.3 percent of the state's commercial banking deposits and operate 61.3 percent of its total banking offices. The two largest institutions, Seattle First and NBC (the acquiring bank here) themselves account for more than half of the state's total deposits and one-third of its total banking offices. Banking concentration is even higher in Eastern Washington, where five banking organizations which operate 69 percent of the region's banking offices have 84 percent of this region's total bank deposits. Moreover, the five largest banks in the state in varying combinations hold a dominant share of deposits in practically all the local banking markets in the state (GX A–35, App. 1197–1198).

As noted in the Statement, *supra,* p. 11, there are only twelve independent middle-sized banks in Washington. They are important factors in preventing

domination of the state's banking by a few large institutions.[80] Washington Trust is one of these. Middle-sized banks smaller than Washington Trust had made market expansions by small acquisitions (GX A–41 (Bank of the West, Bank of Yakima), App. 1204–1205), entering markets where they would have to compete against larger banks. Washington Trust itself had options to purchase the stock of two other banks in Eastern Washington, its officers had participated in the organization of a third, and one of its officers was a member of the board of two of the three (*see* n. 11, *supra*, p. 11). It is, therefore, one of a few banks which has the potential for entering new markets in Eastern and other sections of Washington.

Washington Trust's acquisition by one of the state's dominant banks will add Spokane to the number of local banking markets in which the few large banks in the state face each other as dominant factors, thus contributing to the creation of a statewide banking structure of commonly linked local oligopolies. This creates a real danger that the large banks will renounce vigorous competition,[81] and instead pursue parallel practices of mutual advantage without regard to local competitive conditions.[82] Moreover, the re-

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[80] See Kohn, Carlo and Kaye, *Meeting Local Credit Needs*, New York State Banking Department, pp. 20–21 (1973).

[81] The large banks in Washington have shown a tendency to pursue parallel, and in some instances cooperative, behavior (See GX B–1, B–2, B–3, F–29, F–31, App. 1237–1239, 1277–1278, Dep. R. Buck, pp. 53–57 App. 125–128.).

[82] As a competitive element, the importance of the independent medium-size bank has been especially important in offering "free" checking. The American Bankers Association, in a survey

placement of Washington Trust by a large state leader which is already operating in Eastern Washington eliminates the acquired bank as an independent force which might expand to compete with the State's major banks.

IV. THE ANTICOMPETITIVE EFFECTS OF THE MERGER WOULD NOT BE CLEARLY OUTWEIGHED BY THE PROBABLE EFFECT OF THE MERGER IN MEETING THE CONVENIENCE AND NEEDS OF THE SPOKANE AREA

The Bank Merger Act of 1966 provides that the district courts are to test the validity of bank mergers by the anticompetitive standards of Section 7 of the Clayton Act. It also "created a new defense, with the merging banks having the burden of proving that defense" (*United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 178), namely, whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served" 12 U.S.C. 1828 (c)(5)(B). In bank merger cases the district court is accordingly required "to determine, first, whether the merger offended the antitrust laws and, second, if it did,

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of about 3,100 banks, has found that the greatest percentages of banks offering completely free checking are those in the $50–$100 million-asset category, closely followed by those in the $25–$50 million-asset class. In most market areas, banks under $500 million were initiators. The most important reason for their doing so was to meet competition from other banks. Promotion of new business ranked second in importance. See *New ABA survey on 'free checking,'* Journal of the American Bankers Association, pp. 23, 75 (October 1973).

whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served'" (*United States* v. *Third National Bank in Nashville, supra,* 390 U.S. at 178).

The district court, after concluding that the merger would not have any anticompetitive effects (F. 18, App. 1936), further held (F. 25, App. 1941) that even if the merger would have "some or all of the anticompetitive effects" urged by the government, the defendants nevertheless had established the convenience-and-needs defense. This conclusion was incorrect for two reasons: (1) The court's erroneous conclusion that the merger would have no anticompetitive effect necessarily undermined and invalidated its finding that any anticompetitive effects were clearly outweighed by the merger's effect in meeting community convenience and needs; (2) the benefits that the district court found the merger would bring to the Spokane area do not satisfy the convenience-and-needs standard.

1. A proper evaluation of the convenience-and-needs defense cannot be made on an abstract basis. The anticompetitive consequences of the merger must first be properly determined, and then the effect of the merger in meeting the convenience and needs of the community must be carefully balanced against those anticompetitive effects. "To weigh adequately one of these factors against the other requires a proper conclusion as to each" (*United States* v. *Third National Bank in Nashville, supra,* 390 U.S. at 183). The court's erroneous determination that the effect of

the merger may not be substantially to lessen competition necessarily invalidated its conclusion that any anticompetitive effects it might have were clearly outweighed by its probable effect in meeting the convenience and needs of the Spokane area.

The Bank Merger Act does not permit a district court to apply the convenience and needs standards on the basis of a hypothetical assumption with respect to the charged violation of Section 7 of the Clayton Act. Before a merger with anticompetitive effects may be approved under the "convenience and needs" defense, the court is required to balance the actual anticompetitive effects against the community convenience and needs that the merger would serve, and it may approve the merger only if the latter factors clearly outweigh the anticompetitive effects. If, as we contend, this merger does have the anticompetitive effects condemned by Section 7, the district court must conduct the balancing on the basis of the actual facts relating to the anticompetitive effect, not a hypothetical case.

2. The district court upheld the "convenience and needs" defense because of two types of benefits it concluded the merger would supply by replacing Washington Trust with a much larger bank which could provide in the Spokane area: (a) additional competition with the largest bank in the state, Seattle First; and (b) additional services (F. 25, App. 1941–1950). Neither of these benefits, however, satisfies the "convenience and needs" defense.

a. The primary purpose of the defense was to permit a merger that would enable the merged bank to provide needed services in the community. Cf. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 371. The defense, however, was not intended to sanction an otherwise illegal merger of two large and healthy banks merely because the resulting bank would be able to compete better with an even larger bank in the area.

Under the theory the district court adopted, an anticompetitive merger would be permissible whenever there was a bank operating in the market that would be larger than the combined firm. This theory would rapidly lead to the domination of banking markets by a few large organizations. That is not the result Congress intended when it strengthened the Clayton Act by the 1950 amendments in order to stem "the rising tide of economic concentration" by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317). The approach of the district court would promote rather than halt trends toward further concentration in already concentrated banking markets.

b. The additional services that the district court concluded would justify the merger were an increase in Washington Trust's lending limit from $1.25 mil-

lion to $7.5 million; international banking services; mining, agricultural, and student loans; and municipal bond financing. The district court ruled that increased competition for these few specialized banking services would increase economic growth in Spokane to the benefit of all banking customers (F. 27, App. 1951).

The "convenience and needs" defense, however, requires a showing that the services offered by the new bank are "likely to benefit *all* seekers of banking services in the community * * *." *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 372 (emphasis added). Appellees have not made that showing. The additional services that the merger would enable Washington Trust to provide would benefit only a small number of banking customers.

Appellees have not shown that there is a substantial unsatisfied demand for mining, agricultural and student loans. The number of customers seeking loans in excess of one million dollars necessarily is small. The same is true of international commercial services. Similarly, the greater availability of municipal bond financing can benefit only a few borrowers. Moreover, these specialized services ordinarily are provided by large banks, like NBC, which in this respect operate in national or regional or statewide rather than local markets. Finally, other banks in the area already offer all of these services (Tr. 949, App. 995).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for entry of an appropriate decree.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
DANIEL F. FRIEDMAN,
Deputy Solicitor General.
HOWARD E. SHAPIRO,
GEORGE EDELSTEIN,
PHILIP L. VERVEER,
Attorneys.

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APPENDIX

EXAMPLES FROM 17 STATES IN WHICH BANK HOLDING COMPANIES HAVE CHARTERED NEW BANKS IN MARKETS IN WHICH THEY HAVE BEEN BARRED FROM ESTABLISHING A BRANCH (SEE NOTE 46, SUPRA, PAGE 49)

State	Acquiring organization	Acquired bank	Citation
Colorado	Weerva, Inc.	Westland NB, Longmont	58 F.R. Bull 474 (1972).
Florida	Ellis Banking Corp.	FNB of Hudson, Hudson	59 F.R. Bull 300 (1973).
Iowa	Brenton Banks, Inc.	Brenton B&T of Cedar Rapids	58 F.R. Bull 65 (1972).
Maine	United Bancorp. of Maine	Central NB, Waterville	57 F.R. Bull 727 (1971).
Michigan	American National Holding Co.	American NB in Western Mich., Allegan.	38 F.R. 27550 (10-4-73).
Missouri	Mercantile Bancorp.	Mercantile NB of St. Louis County.	38 F.R. 20125 (7-27-73).
Minnesota	Mid American Bancorp.	Mid American State Bank of Mendota Heights.	57 F.R. Bull 858 (1971).
New Hampshire	Suncook Bank	Hooksett Bank, Hooksett	57 F.R. Bull 694 (1971).
New Jersey	Midlantic Banks, Inc.	Midlantic National Bank of Somerset, Bernardsville.	38 F.R. 23989 (9-5-73).
New York	First National City Corp.	Citibank, N.A. Islip	57 F.R. Bull 944 (1971).
Ohio	BancOhio Corp.	Community NB, Loveland	58 F.R. Bull 155 (1972).
Tennessee	Hamilton Bancshares, Inc.	Hamilton National Bank of Nashville.	Approved by the Fed. Reserve Bank of Atlanta under delegated authority (11-7-72).
Texas	First City Bancorp. of Texas, Inc.	First Professional Bank, N.A.—Houston.	38 F.R. 18452 (7-11-73).
Utah	First Security Corp.	First Security Bank of Murray, N.A.	38 F.R. 18411 (7-10-73).
Virginia	Va. National Bancshares, Inc.	VNB/Henry Co.	38 F.R. 17545 (7-2-73).
Wisconsin	Affiliated Bank Corp.	Middleton Shores Bank—Middleton.	58 F.R. Bull 165 (1972).
Wyoming	Wyoming Bancorp.	FNB of Jackson Hole—Jackson	57 F.R. Bull 737 (1971).

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